(11)

No. 84-9

In the Supreme Court of the United States

OCTOBER TERM, 1984

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY and CECILIA STEVENSON,

Petitioners,

v.

DORIS RUSSELL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE MOTION PICTURE HEALTH & WELFARE FUND IN SUPPORT OF PETITIONER

WILLIAM L. COLE
(Counsel of Record)
HENRY E. FARBER
MITCHELL, SILBERBERG & KNUPP
11377 West Olympic Boulevard
Los Angeles, California 90064
Telephone: (213) 312-2000
Attorneys for Amicus Curiae Motion Picture Health & Welfare Fund

Westside Law Publishers Los Angeles, California (213) 477-0491

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QUESTION PRESENTED

Whether the Employee Retirement Income Security Act permits an employee benefit plan participant or beneficiary to recover punitive damages or extra-contractual compensatory relief from a plan fiduciary for improper or untimely processing of benefit claims?

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INTEREST OF THE AMICUS CURIAE

The Motion Picture Health and Welfare Fund ("Fund") is a multi-employer, multi-union health and welfare fund created pursuant to collective bargaining agreements in the motion picture industry in Los Angeles, California.

The Fund was created pursuant to Section 302 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. §186, and is administered by a Board of Trustees consisting of an equal number of management and union trustees. The management and union trustees serve on a voluntary basis and receive no compensation for their services.[1] The Fund provides health and welfare benefits to more than 25,000 active and retired employees in the motion picture industry and to the dependents of said employees.

For many years, the Fund provided all benefits to its participants and beneficiaries through the purchase of insurance policies. While the Fund maintained a full complement of employees for claims processing, the final decisions in disputed benefit claims cases were left to the insurance company which issued the policy in question. The utilization of insurance companies to administer the Fund's plan of benefits provided some insulation to the Fund and its Trustees from actions by participants and beneficiaries claiming extra-contractual and punitive damages in cases involving the denial of benefits. Such actions were typically brought against the insurance carrier administering the relevant portion of the plan, and the time and expense involved in defending against such claims were the responsibility of the carrier.

This method of providing benefits, however, proved unduly expensive in light of the Fund's size and ability to self-fund the benefits. Accordingly, effective July 1, 1983, the Trustees of the Fund decided to pay most of the

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[1] Seventeen of the eighteen trustees are full-time paid employees of employers, associations of employers and employee organizations whose employees and members are participants in the Fund. Accordingly, they would be prohibited by ERISA from receiving compensation from the Fund even if the Fund's plan document otherwise provided for compensation. 29 U.S.C. §1108(c) (2).

medical benefits provided under the Fund's plan of benefits itself and to administer benefit claims internally. The self-funding of benefits results in very substantial savings to the Fund and inures to the benefit of all participants by bolstering the Fund's financial stability. If the Ninth Circuit's opinion below is permitted to stand, however, the Trustees will be forced to reconsider the prudence of self-funding in light of the significant risks that would be faced by the Fund and its fiduciaries.

Pursuant to Section 503 of ERISA, 29 U.S.C. §1133, the Fund has created a Claims Review Committee vested with final authority to decide whether or not benefits are payable for a disputed claim. Four members of the Board of Trustees serve as the Committee, without pay. Under the Ninth Circuit's opinion, these committee members can expect to be named individually in suits for extra-contractual and punitive damages in any action in which a participant or beneficiary contests a denial of benefits, since such damages would not be available from the plan itself.

Many responsible labor and management officials will decline to serve as fiduciaries for the Fund and other self-funded benefit plans if, by serving, they subject themselves to the risk and expense of defending against such actions. Those officials who do agree to serve will inevitably consider the potential for individual liability as a factor in their benefit decisions, thereby increasing the likelihood that unmeritorious claims will be paid. In either event, the Ninth Circuit's decision operates to the detriment of the participants in the plan as a whole.

The foregoing problems created by the Ninth Circuit's opinion are real, not hypothetical. Within two months of becoming self-funded, the Fund was sued by a participant claiming that the Fund wrongfully denied him benefits.

This action is presently pending in the United States District Court for the Central District of California and involves a claim for approximately $17,000 in benefits. While the benefit claim is relatively small, the plaintiff seeks unspecified damages for pain and suffering, as well as punitive damages, thereby subjecting the Fund and its fiduciaries to substantial potential liability. *Wilson v. Motion Picture Health and Welfare Fund, et al.*, Case No. CV 83-8516 RMT(Kx). It is respectfully submitted that unless the decision below is reversed, such lawsuits against the Fund and other employee benefit plans will multiply as disgruntled participants and their attorneys anticipate the prospect of obtaining substantial damage awards and extracting large sums in settlement.

Petitioners and Respondent have consented to the filing of this brief, and their respective letters of consent have been filed with the Court.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 722 F.2d 482 (9th Cir. 1983). In that decision, the Ninth Circuit held that punitive and compensatory damages may be awarded to a participant or beneficiary of an employee benefit plan against a plan fiduciary under Section 409 of ERISA, 29 U.S.C. §1109. The Ninth Circuit concluded that the phrase "other equitable or remedial relief as the court may deem appropriate" in Section 409 authorized awarding such relief. The Ninth Circuit reasoned, *inter alia*, that if such damages were not available, fiduciaries would have no incentive to act responsibly in making decisions on benefit claims.

The order of the United States District Court for the Central District of California granting Petitioners' motion for summary judgment, as well as the findings of fact and conclusions of law issued in connection therewith, are

unreported and appear in the Appendix submitted by the parties to this case at 26a through 32a.

SUMMARY OF ARGUMENT

Amicus curiae joins with Petitioners in seeking reversal of the decision below that a participant or beneficiary may recover extra-contractual and punitive damages under the Employee Retirement Income Security Act ("ERISA") from an individual fiduciary of an employee benefit plan. The Ninth Circuit's holding ignores the comprehensive scheme of remedies provided by ERISA and is contrary to the plain language of Section 409. By its terms, Section 409's remedies may only inure to the benefit of the plan itself. The Ninth Circuit's construction of Section 409 as permitting the award of damages directly to participants and beneficiaries is based upon isolated language taken out of context. When the statute is read as a whole, it is apparent that the Ninth Circuit's reading of the statute is erroneous and that the only remedies available to participants or beneficiaries in the benefit claims context are those set forth in Sections 502(a) (1) (B) and 502(a) (3), which do not include the recovery of extra-contractual or punitive damages.

The legislative history of ERISA also fails to support the Ninth Circuit's conclusion. The one citation to legislative history made by the Ninth Circuit did not refer to Section 409, but to another section of ERISA that provided a much broader range of remedies. Moreover, the reference was to earlier versions of ERISA that had different remedial provisions. Further, the legislative history indicates that Congress intended any relief available under Section 409 to go only to the plan. In short, the legislative history of ERISA is in accord with the clear language of the statute and compels the conclusion that extra-contractual and

punitive damages are not available to a participant or beneficiary in a benefit claims action.

Moreover, significant policy reasons require the reversal of the Ninth Circuit's decision. By holding fiduciaries personally liable for extra-contractual damages resulting from a denial of a claim for benefits, the Ninth Circuit placed the risk of administering a benefit plan on the fiduciaries themselves. Because such damages are not recoverable against a plan, a claim for extra-contractual damages against the fiduciaries will inevitably be added whenever a claim for wrongful denial of benefits is brought against the plan. Few persons will agree to act as fiduciaries if they are subject to personal liability for erroneous decisions. Further, those who do agree to act as fiduciaries will be encouraged to award benefits in all questionable cases. Accordingly, the Ninth Circuit's decision would unnecessarily increase the cost of operating employee benefit plans, and is thereby contrary to the intent of ERISA.

ARGUMENT

A. THE PLAIN LANGUAGE AND DETAILED SCHEME OF ERISA DEMONSTRATE THAT EXTRA-CONTRACTUAL DAMAGES CANNOT BE AWARDED TO A PARTICPANT OR BENEFICIARY IN THE BENEFIT CLAIM CONTEXT.[2]

This Court has long recognized that when Congress has enacted a comprehensive statute containing a detailed remedial scheme, the courts should be loathe to "expand the coverage of the statute to subsume other remedies." *National Railroad Passenger Corp. v. National Association of Railroad Passengers,* 414 U.S. 453, 458 (1974). As this Court stated in *Northwest Airlines, Inc. v. Transport Workers Union:*

> The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement. . . . The judiciary may not, in the face of such comprehensive legislative schemes, fashion new remedies that might upset carefully considered legislative programs.

451 U.S. 77, 97 (1981).

In the decision below, the Ninth Circuit failed to heed this advice. Rather, the Ninth Circuit attempted to manufacture statutory authority for awarding extra-contractual and punitive damage remedies to participants and beneficiaries by reading in isolation the clause

[2]Since the briefs of Petitioners and other *amici* focus on the unavailability of punitive damages under ERISA, this brief will concentrate on the issue of whether a participant or beneficiary may recover extra-contractual damages, such as damages for pain and suffering, in a suit against a fiduciary brought pursuant to Sections 409 and 502(a) (2) of ERISA, 29 U.S.C. § §1109, 1132(a) (2).

contained in Section 409 of ERISA that provides for the award of "other equitable or remedial relief as the court may deem appropriate." *See Russell,* 722 F.2d at 490. As shown below, the Ninth Circuit's conclusion neither comports with ERISA's detailed remedial scheme nor properly interprets the statutory language in issue. An examination of those remedial provisions demonstrates that Section 409, and the phrase permitting "equitable or remedial relief," provide remedies only to the plan itself, not to individual participants and beneficiaries contesting a benefit claim decision.

The civil enforcement provisions of ERISA are contained in Section 502, 29 U.S.C. §1132, and include both individual actions available to participants and beneficiaries and general enforcement actions which may be brought on behalf of the plan by the Secretary of Labor or by a participant, beneficiary, or fiduciary acting in a representative capacity. *Compare* Section 502(a) (1) (A) and (B) and (a) (3) with Section 502(a) (2), (4), (5) and (6). Among the actions available to a participant or beneficiary for individual relief under Section 502 is one for wrongful denial of benefits. The remedies available to a participant or beneficiary in such a benefit claim action are set forth in Section 502(a) (1) (B), which provides that an action may be brought:

> to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan . . . .

29 U.S.C. §1132(a) (1) (B). As this section makes clear, Congress has specifically limited the monetary remedy available to a participant or beneficiary to the recovery of the amount of benefits due. *Bittner v. Sadoff & Rudoy Industries,* 728 F.2d 820, 825 (7th Cir. 1984) (money damages beyond the amount of benefits due are not available in an action under Section 502(a) (1) (B)).

However, Congress did not leave participants and beneficiaries without redress in the event of wrongdoing on the part of a plan or its fiduciaries. Section 502(a) (3) specifically permits a participant, beneficiary or fiduciary to bring an action for equitable relief:

> (A) To *enjoin* any act or practice which violates any provision of this subchapter or the terms of the plan or (B) to obtain other appropriate *equitable* relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan . . . .

29 U.S.C. §1132(a) (3) (emphasis added). As the court noted in *Stamps v. Michigan Teamsters Joint Council No. 43,* "[s]ubsection (a) (3) clearly and specifically creates a civil action for *equitable* relief." 431 F.Supp. 745, 747 (C.D. Mich. 1977) (emphasis added).

In sum, Congress specifically dealt with the question of the remedies available to a participant or beneficiary claiming a wrongful denial of benefits or a violation of the provisions of ERISA or of the plan, and limited them to the recovery of benefits due and other equitable relief. It is well established, of course, that equitable relief does not include compensatory damages for pain and suffering or other traditional legal relief. D. Dobbs, *Handbook of the Law of Remedies,* §1.1 at 1-3 (1973).[3]

Unlike sections 502(a) (1) (B) and (a) (3), the other subsections of Section 502 are general enforcement

[3]As Petitioners make clear in their brief, punitive damages are also a legal rather than an equitable remedy and therefore are not available to a participant or beneficiary in a benefit claim action. *See Curtis v. Loether,* 415 U.S. 189, 196 (1974); *Walker v. Ford Motor Co.,* 684 F.2d 1355, 1364 (11th Cir. 1982); *Richerson v. Jones,* 551 F.2d 918, 927 (3d Cir. 1977); *Pearson v. Western Electric Co.,* 542 F.2d 1150, 1152 (10th Cir. 1976).

provisions designed to protect the plan itself. In particular, Section 502(a) (2) permits the *Secretary of Labor*, a participant, beneficiary, or fiduciary to bring an action "for appropriate relief under Section 1109 [Section 409] of this title . . . ." 29 U.S.C. §1132(a)(2). The inclusion of the Secretary of Labor in the class of persons entitled to bring such actions demonstrates Congress' intent that actions for breach of fiduciary duty be brought in a representative capacity on behalf of the plan as a whole.

The language of Section 409 eliminates any doubt that any remedies awarded should inure to the plan itself, not to individual fiduciaries. Section 409 provides:

> (a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good *to such plan* any losses to the plan resulting from each such breach, and to restore *to such plan* any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

29 U.S.C. §1109 (emphasis added).

It is a basic tenet of statutory construction that words are "known by the company [they] keep." *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961). By considering and quoting the phrase "other equitable and remedial relief" out of context, the Ninth Circuit greatly expanded its meaning. *See Russell*, 722 F.2d at 488, 490. Read in context, the phrase "other equitable or remedial relief" plainly refers to other forms of relief available to the plan. The phrase appears within the same sentence as

and directly after a listing of two types of relief available to the plan. The word "other" was obviously intended to present an alternative to the types of relief available; it cannot be construed as creating an entirely new class of persons to whom the relief may be awarded.[4] *Zink v. Heiser*, 109 Misc.2d 354, 438 N.Y.S.2d 209, 215 (1981) (recovery against fiduciary under Section 409 available only to the plan and not to participants or beneficiaries).

This result is supported by the well-established doctrine of statutory construction *ejusdem generis*. Under this doctrine, where general words follow specific words, "the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." C. Sands, 2A *Sutherland Statutes and Statutory Construction* §4717, at 103 (4th ed. 1973). *See also Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 726, 734 (1973); *U.S. v. Jones*, 131 U.S. 1, 19 (1889) ("It is one of these general expressions which must be restrained by the more special and definite indications of intention furnished by the context.") In Section 409, the relief described in the general phrase "other equitable and remedial relief" must be construed to be of the same nature as the relief

[4]Thus, a court may grant other forms of relief normally available in the enforcement of trusts, such as imposing constructive trusts, requiring an accounting, enjoining specific activity, or ordering specific performance. *See* G. Bogert, *The Law of Trusts and Trustees* §861, at 2-27 (2d ed. rev. 1982). For examples of cases in which the courts have granted "other equitable or remedial relief" under Section 409, *see Davidson v. Cook*, 567 F.Supp. 225, 240 (E.D. Va.1983), *aff'd*, 734 F.2d 10 (4th Cir.), *cert. denied sub nom. Accardi v. Davidson*, 53 U.S.L.W. 3270 (1984) (fiduciaries personally liable to plan for diminished value of investment); *Gilliam v. Edwards*, 492 F.Supp.1255 (D.N.J. 1980) (fiduciary obligated to rescind self-dealing employment agreement and to repay fund for compensation paid pursuant to agreement); *Marshall v. Kelly*, 465 F. Supp. 341, 354 (W.D. Okla. 1978) (court orders rescission of unlawful transactions and appoints interim trustees).

previously specified in the section — relief to the plan. Indeed, the example given, removal of a fiduciary, is precisely the type of remedy sought for the benefit of the plan as a whole.

In short, when Section 409 is read as a whole and is considered in the context of the entire scheme of remedial relief established by ERISA, it is clear that it was not intended to provide a remedy to a disappointed participant or beneficiary of a plan in a case involving a claim for benefits. To the contrary, Section 409 was designed to protect the plan itself from breaches of duty by its fiduciaries and Section 502(a) (2) merely permits participants and beneficiaries to initiate actions for relief under Section 409 on behalf of the plan.

B. THE NINTH CIRCUIT'S DECISION IS NOT SUPPORTED BY THE LEGISLATIVE HISTORY OF ERISA.

The Ninth Circuit's selective reading of the statute is rivaled only by its cavalier use of inapplicable portions of ERISA's legislative history to support its erroneous conclusion. To justify its assertion that Section 409 contemplates awards of extra-contractual and punitive damages, the Ninth Circuit relied heavily upon language in early Senate and House Committee reports that Congress intended ERISA to provide "the full range of legal and equitable remedies available in both state and federal courts." *Russell,* 722 F.2d at 490, 491, *quoting* H.R. Rep. No. 93-533, 93d Cong., 1st Sess. 17 and S.R. Rep. No. 93-127, 93d Cong., 1st Sess. 35, reprinted in *Legislative History of the Employee Retirement Income Security Act of 1974* (Comm. Print 1976) (hereinafter *"Legis. Hist."*) 621, 2364. *See also International Union, United Automobile Workers v. Federal Forge, Inc.,* 583 F.Supp. 1350, 1356-57 (W.D. Mich. 1984); *Eaton v. D'Amato,* 581 F.Supp. 743, 747, (D.D.C. 1980).

This quote, however, does not reflect Congress' intentions with regard to the interpretation of Section 409. Indeed, it does not even relate to Section 409. In both the Senate and House reports, the quoted language is found in a section describing the enforcement provisions of the bills. *Legis. Hist.* at 621, 2364. In the bills under consideration by the Senate and House at that time, it was the predecessors of Section 502 that were contained in the enforcement sections of the bills. *Legis. Hist.* at 577, 579, 2331, 2334. In contrast, the predecessors of Section 409 were contained in sections of the bills entitled "Disclosure and Fiduciary Standards" and "Fiduciary Responsibility and Disclosure," respectively. *Legis. Hist.* at 540, 2259. Thus, the language relied upon by the Ninth Circuit below refers to the breadth of remedies provided by Section 502 of ERISA, not to the limited remedy contained in Section 409.[5]

More importantly, the language quoted by the Ninth Circuit sheds no light on ERISA as finally enacted. The quoted language appeared in early Senate and House reports, which were published before debates, before the bills went before a Senate-House Conference Committee, and before the remedy provisions of the Act were finalized. Indeed, the sections providing remedies for breach of fiduciary duty in the Senate version of the bill at the time of the report called for considerably greater relief than is presently provided in ERISA. The Senate version of

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[5]The many types of relief encompassed in Section 502 include statutory penalties, §502(a) (1) (A), 29 U.S.C. §1132(a) (1) (A), suits for benefits due, §502(a) (1) (B), 29 U.S.C. §1132(a) (1) (B), declaratory relief, §502(a) (1) (B), 29 U.S.C. §1132(a) (1) (B), equitable relief, §502(a) (3) and (4), 29 U.S.C. §1132 (a) (3), (4), as well as civil penalties, §502(a) (5), 29 U.S.C. §1132(a) (5).

Section 502 specified that beneficiaries and participants could bring "[c]ivil actions for appropriate relief, *legal or equitable*, to redress or restrain a breach of any responsibility, obligation, or duty of a fiduciary, including but not limited to, the removal of a fiduciary. . . ." H.R. 4200, *Legis. Hist.* at 2099 (emphasis added). The elimination of this reference to legal relief in the final bill indicates that Congress did not intend to permit the recovery of compensatory or punitive damages.

Moreover, nothing in the quoted phrase indicates an intent that any relief available under Section 409 should be awarded to participants or beneficiaries rather than the plan. To the contrary, the legislative history is consistent with the language of the statute and confirms Congress' intent that the remedies available under Section 409 inure to the plan, not to individuals. S. Rep. No. 93-127, 93d Cong, 1st Sess. 33, *Legis. Hist.* at 619 ("a fiduciary is made personally liable for his breach of any responsibility, duty, or obligation owed to the fund, and must reimburse the fund for any loss resulting from such a breach"); "Private Pension Reform Legislation, 93d Congress, March, 1974 — Comparison of Senate-passed and House-passed versions of H.R. 2," prepared by Congressional Research Service of Library of Congress, *Legis. Hist.* at 4265 (both House and Senate versions provide that a fiduciary is personally liable to the fund for any losses resulting from a breach of fiduciary obligations). Accordingly, even if the legislative history cited by the Ninth Circuit were applicable to Section 409, it would not detract from the inevitable conclusion that Section 409 provides relief only to the plan.

C. PUBLIC POLICY MILITATES AGAINST ALLOWING BENEFICIARIES AND PARTICIPANTS TO OBTAIN EXTRA-CONTRACTUAL DAMAGES FROM FIDUCIARIES.

While the plain language of the statute and its legislative history amply demonstrate that the decision below should be reversed, this conclusion is buttressed by important public policy reasons relating to the administration of employee benefit plans. If the Ninth Circuit's decision were permitted to stand, it would inevitably lead to increased litigation in the federal courts, a reluctance by responsible individuals to serve as plan fiduciaries, and an inequitable shifting of the costs of operating benefit plans from the plan and its sponsors to the shoulders of individual fiduciaries.

As previously noted, the touchstone of the Ninth Circuit's decision is its holding that the authority to award compensatory and punitive damages emanates from the language of Section 409. Section 409, however, only provides a remedy against individual fiduciaries and is inapplicable to actions against the plan itself. *Russell,* 722 F.2d at 490 n. 8. Accordingly, under the Ninth Circuit's decision, a participant or beneficiary seeking an award of compensatory damages for pain and suffering must sue the individual fiduciaries responsible for the benefit decision, rather than the plan. In light of the nebulous proof requirements and high recoveries associated with claims for pain and suffering, it is inevitable that any individual filing a claim against a plan alleging wrongful denial of benefits will also assert a claim against the plan's fiduciaries for compensatory damages.[6] Indeed, it would be

[6] This would also lead to the anomalous result that all benefit claim actions would be brought in federal court despite the fact that Congress specifically provided for concurrent state court jurisdiction over actions brought under Section 502(a) (1) (B). 29 U.S.C.

tantamount to malpractice for an attorney to fail to advise his client to bring such a double-barrelled action.

In short, since extra-contractual damages would be available only against fiduciaries and not the plan, adoption of the Ninth Circuit's interpretation of ERISA would imply that Congress intended to shift a major portion of the risk of operating benefit plans to fiduciaries. The impact of such risk shifting would be particularly troublesome in light of the court's further holding that a breach of fiduciary duty, and thus a right to compensatory damages, can be established by a showing of mere negligence — the failure to exercise "reasonable care." 722 F.2d at 489 & n. 7. In the benefit claims context where the issue is often a close question of whether benefits should be awarded under a specific set of facts, fiduciaries could find themselves facing potential personal liability whenever they make a good faith but erroneous decision to deny benefits.

Significantly, it is primarily uncompensated individuals who would be affected by the opinion below. In the majority of self-insured employee benefit plans, the plan sponsors appoint their own full-time employees to serve as fiduciaries. Such individuals are prohibited from receiving compensation for the performance of fiduciary duties. 29 U.S.C. §1108(c)(2). On the other hand, the Ninth Circuit's decision would have no effect on insurance companies acting as fiduciaries under insured welfare benefit plans, since several courts have held that such carriers remain subject to state law actions for compensatory and punitive damages because ERISA does not

§1132(e) (1). The federal courts have *exclusive* jurisdiction over actions alleging a breach of fiduciary duty under Section 502(a) (2) and, therefore, provide the only appropriate forum when the two claims are joined in a single action.

preempt state laws regulating insurance. 29 U.S.C. §1144(b)(2)(A); *see, e.g., Eversole v. Metropolitan Life Insurance Co.*, 500 F.Supp. 1162, 1170 (C.D. Cal. 1980); *McLaughlin v. Connecticut General Life Insurance Co.*, 565 F.Supp. 434, 443-44 (N.D. Cal. 1983).

Moreover, a plan cannot effectively insure such uncompensated fiduciaries against losses arising out of a breach of fiduciary duty. 29 U.S.C. §1110. The Ninth Circuit points out in *Russell* that while liability under Section 409 is against the individual fiduciary personally, 29 U.S.C. §1110 allows for "certain forms of fiduciary indemnification." 722 F.2d at 490 n. 8. The Ninth Circuit's decision fails to consider, however, that while 29 U.S.C. §1110 permits a plan to purchase insurance for its fiduciaries to cover liability or losses occurring by reason of the act or omissions of the fiduciary, the insurance policy must permit recourse by the insurer against the fiduciary in the case of a breach of fiduciary obligations. 29 U.S.C. §1110. Since compensatory damages under Section 409 would be predicated upon a finding of breach of fiduciary duty, the exception would necessarily swallow the rule in this situation.[7]

In these circumstances, holding individual fiduciaries liable under ERISA for extra-contractual and punitive damages in the benefit claims context can only have the undesirable result of deterring qualified individuals from volunteering to serve as fiduciaries. Few people would agree to be placed in a position in which they were regularly required to make decisions as to the propriety of benefit claims if they risked personal liability for each

[7]While the fiduciaries or their employers may purchase insurance without such a recourse provision, they must bear the costs of the insurance and, thus, the costs of operating the plan are still shifted away from the plan itself. Moreover, as discussed in Petitioners' brief, in many states no insurance is available for punitive damages.

erroneous decision. For the same reasons, it can be expected that those individuals who do choose to serve as fiduciaries will be extremely timid in the administration of claims and will opt to award benefits whenever there is any question as to a claim's validity. It is respectfully submitted that Congress never intended such a result.[8]

The Court below suggests that if compensatory and punitive damages could not be recovered against fiduciaries, fiduciaries would have no incentive to abide by the terms of the plan or of ERISA. *Russell*, 722 F.2d at 490. The simple answer to this contention is that Congress did not provide for such relief and it is not for the courts to engraft additional remedies onto the detailed statutory scheme. In any event, Congress did provide ample procedures to correct any fiduciary misconduct. Participants and beneficiaries may always maintain actions to recover benefits wrongfully denied, 29 U.S.C. §1132(a)(1)(B), and may recover attorneys' fees in appropriate cases, 29 U.S.C. §1132(g)(1). Participants and beneficiaries may also seek equitable relief to enjoin violations of the plan's terms, 29 U.S.C. §1132(a)(3), and may seek removal of the fiduciary for improper conduct, 29 U.S.C. §1109. In sum, Congress has provided sufficient means of relief to ensure that participants and beneficiaries have a method of controlling the fiduciary's conduct.

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[8]It could be argued, of course, that a plan can avoid these problems by simply reverting to purchasing insurance and delegating the fiduciary duty of deciding benefit claims to an insurance company. As *amicus curiae's* experience shows, however, it can be substantially more expensive to provide benefits through an insured plan than to self-insure, and such a result may therefore needlessly increase the cost of administering welfare benefit plans. See pp. 2-3, *supra*. In addition, Congress clearly intended employee welfare benefit plans to have the choice between self-insuring and purchasing insurance. *See e.g.*, 29 U.S.C. §1023(e); 29 U.S.C. §1101(b) (2); 29 U.S.C. §1112(a) (2) (B); 29 U.S.C. §1144 (b) (2) (B).

Moreover, the decision below primarily affects those fiduciaries who do not act in that role for personal profit and who, therefore, have nothing to gain by wrongfully withholding benefits. As previously noted, profit-oriented fiduciaries are already subject to the precise sanctions that the Ninth Circuit's holding would add to ERISA. See pp.16-17, *supra*. Accordingly, the Ninth Circuit's decision would only add a deterrent where none is necessary.

In conclusion, it is apparent that adopting the interpretation of the Court below would only hamper the efficient operation of employee benefit plans without any concomitant benefit to the participants and beneficiaries.

D. SECTIONS 409 AND 502(a)(2) OF ERISA DO NOT PROVIDE FOR THE RECOVERY OF PUNITIVE DAMAGES BY A PARTICIPANT OR BENEFICIARY FROM A FIDUCIARY.

For each of the reasons set forth above, it is clear that Congress did not intend fiduciaries to be held personally liable for punitive damages under Section 409. Moreover, the possibility of incurring punitive damage liability will further discourage competent persons from serving as fiduciaries.

Amicus curiae adopts the arguments encompassed in Petitioners' brief and joins Petitioners in urging that the portion of the decision below permitting the imposition of punitive damages be reversed as well.

CONCLUSION

For the reasons and on the authorities set forth above, and for the reasons expressed in Petitioners' Brief on the merits, *amicus curiae* respectfully requests that the decision below on the issue of extra-contractual and punitive damages be reversed.

Dated: November 14, 1984

Respectfully submitted,
WILLIAM L. COLE
(Counsel of Record)
HENRY E. FARBER
MITCHELL, SILBERBERG & KNUPP
Attorneys for Amicus Curiae
Motion Picture Health & Welfare Fund

PROOF OF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on November 13, 1984, I served the within *Brief of Amicus Curiae* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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Supreme Court
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Washington, D.C. 20543
(Original and 40 copies)

Brad N. Baker
Baker and Burton, P.C.
515 Pier Avenue
Hermosa Beach, California 90254
(Three copies)

John Nolan
Paul J. Ondrasik, Jr.
Antonia B. Ianniello
Steptoe & Johnson
1250 Connecticut Ave. N.W.
Washington, D.C. 20036
(Three copies)

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 13, 1984, at Los Angeles, California.

Joy Rivelli Miller
(Original signed)